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Nos. 05-204, 05-254, 05-276 and 05-439

In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICUS CURIAE* UNIVERSITY PROFESSORS CONCERNED ABOUT EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTION PRESENTED

May a legislative body, in mid-decade, voluntarily and without a compelling reason replace a valid districting plan with a new one relying on the population data from the last census?

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INTEREST OF *AMICUS CURIAE*

This *Amicus Curiae* brief is submitted on behalf of the University Professors Concerned About Equal Representation For Equal Numbers of People. The individual *Amici* are Professors David A. Anderson (University of Texas), Julius P. Getman (University of Texas), Teresa R. LeClercq (University of Texas), Sanford V. Levinson (University of Texas), Lucas A. Powe, Jr. (University of Texas), Jordan Steiker (University of Texas), Jay L. Westbrook (University of Texas), and John Aldrich (Duke University).[1] This *Amicus* organization is submitting this brief because of concern over the impact of this case on the fundamental principle that legislative bodies must make a good faith effort to provide the citizens of a state with election districts as equal in population as practicable. The resolution of this case will be significant to the constitutional jurisprudence of this country.

The "University Professors" participated fully in this case on remand as an *Amicus*. The District Court below *sua sponte* required the State Defendants to respond to the *Amicus* brief and required the Plaintiffs to provide time at the hearing on January 21, 2005 for an oral presentation by Professor Powe on behalf of *Amicus*. Much of the lower court's written opinion deals with the written and oral arguments presented by *Amicus*. The equal representation for equal numbers of persons issue addressed by *Amicus*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amicus* states that none of the parties authored this brief in whole or in part and no one other than the *Amici* or counsel contributed money or services to the preparation and submission of this brief.

below and in this brief is essentially raised by two of the Appellants[3] in this consolidated case. The *Amici* believe that the information provided in this brief will assist this Court in resolving the difficult questions posed in this case.

SUMMARY OF ARGUMENT

The congressional redistricting plan passed by the Texas legislature in 2003 was drawn voluntarily and for partisan reasons. It replaced a lawful existing plan. These facts distinguish this case from the many other redistricting cases decided by this Court in the past forty years. The new plan utilized population data that were outdated and inaccurate. This Court has never directly considered whether a partisan use of the electoral process under such circumstances is constitutional.

Appellees claimed in the court below that any legislatively enacted redistricting plan complies with the constitutional requirement for equal population among election districts so long as it contains districts that are equal in population based on the enumeration from the last federal decennial census. *Amicus* urges that the constitutional mandate requires that a legislature cannot voluntarily redistrict using population data that is known to be outdated and inaccurate unless a compelling state reason exists for the redistricting and the use of the data. Otherwise such

[3] The Travis County Appellants and the League of Latin American Citizens Appellants have raised similar "one person, one vote" or "equal population" challenges to the 2003 Texas redistricting. This *Amicus Curiae Brief* is submitted in support of these Appellants, but is not submitted in opposition to the position of any Appellant.

redistricting, to further the partisan designs of a temporary legislative majority, is a breach of a legislature's fundamental duty to make a good faith effort to provide its citizens with election districts as equal in population as practicable.

Appellees' legal position is a threat to representative government in this country. This brief discusses several of the dangers inherent in Appellees' position. One threat, however, stands out as a result of oral argument in the court below. In response to a question from that court, Appellees' counsel correctly acknowledged that, if the Appellees' legal position is correct, a state legislative body can voluntarily redraw state legislative districts at the end of a decade (e.g., 2009) using data from the prior federal decennial census. Such a possibility means that a temporary political majority in a highly charged partisan environment can voluntarily redraw state legislative districts immediately prior to elections at the end of a decade (e.g., 2010) notwithstanding population shifts in the state over the decade. Through this maneuver, a temporary partisan or interest majority can redistrict to preserve or enhance its political advantages and thereby unfairly control the redrawing of state and congressional districts after the new census.

Many other state and local government officials have already publicly expressed an interest in the possibility of following the Texas example and redrawing existing election districts during this decade to benefit one partisan or special interest over another. Others will surely do so if this Court upholds the Texas congressional redistricting plan. Such a prospect of a "rolling redistricting" on the basis of old, inaccurate population data is anathema to the constitutional principle of one person, one vote and a

threat to representative government. It would constitute further unfortunate confirmation of representatives picking their voters rather than vice versa.

Adoption by this Court of the position urged by *Amicus* in this brief can end this threat through the common sense, easily administered application of existing constitutional principles.

ARGUMENT

I. Voluntary Redistricting Using Inaccurate Population Data is a Threat to Fundamental Constitutional Rights and Representative Government.

Few, if any, officials have suggested that voluntary redistricting mid-decade is a good policy. Virtually any redistricting is likely to be divisive, distracting, confusing to voters, and costly of legislative time and energy. As shown by the extraordinary events in Texas in 2003, a voluntary mid-decade redistricting undertaken to maintain or enhance a temporary majority's political strength is likely to be even more disruptive. Voluntary redistricting mid-decade by a state or local legislative body using inaccurate population data is a way of thwarting political changes that would normally accompany population changes and shifting voter preferences. As Justice Breyer recognized in his dissent in *Vieth v. Jubelirer*,[3] a political party might redistrict periodically during a decade to

[3] 541 U.S. 267 (2004).

preserve its political advantages notwithstanding population shifts in the state. A temporary majority in a state legislative body may redistrict state legislative districts at the end of a decade to permit itself to maintain or enhance its dominance for the critical time of redistricting after the new census. The court below asked Appellees' counsel whether Appellees' legal position in this case would permit such a redistricting for partisan advantage at the end of a decade, and Appellees' counsel correctly answered that it would.[4]

The 2003 redistricting in Texas is a perfect example of how Justice Breyer's concerns were fulfilled. The final redistricting plan passed in Texas was unlike either of the plans passed earlier in the legislative session by the Texas Senate or the Texas House. The conference committee that was charged with resolving differences between the two plans never met. Instead, the final plan was accomplished literally behind closed doors by a handful of like-minded partisan activists using computers to manipulate data from a variety of political data bases designed to predict how each election precinct statewide would perform in future congressional elections. Plans were endlessly tweaked on computer monitors to achieve the best possible partisan result. All of this secret activity occurred under scrutiny and pressure from external partisan interests. The 2003 memoranda[5] from Mr. Jim Ellis to Congressman Tom DeLay provide a valuable insight into what was actually happening throughout 2003 and at this final stage. In his memorandum of October 5, 2003, Ellis notes

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[4] Transcript at 138-139 (January 21, 2005).

[5] Jackson Pls. Exhibit No. 136.

that he and Congressman DeLay had already achieved the goals of "helping Bonilla (District 23) and eliminating the Frost district (District 24)" through changes achieved at the conference committee. However, Ellis urged that further "major adjustments must be made to ensure that the map reflects the priorities of the congressional delegation and not the legislature." Ellis lamented that the map under consideration at the time was still flawed with "largely insignificant state legislative agendas." Ellis concluded his October 5th memorandum to DeLay with the insistence that "[w]e need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."[6]

Congressman DeLay journeyed again to Austin. For the next few days he met with the state officials. Ellis got his wish. The final redistricting map was unveiled on October 9th, only three days before it was finally passed by an exhausted Texas Legislature. This final plan embodied an extreme partisan aggressiveness. Unlike the maps adopted earlier by the Texas House and Texas Senate, this final plan bolstered Republican Congressman Bonilla's District 23 with Anglo Republican counties, dismantled District 24 (Congressman Frost), and targeted every Anglo Democratic incumbent for defeat by dismantling their existing districts and leaving their residence in a heavily Republican district. The plan was a partisan masterpiece that not only resulted in the immediate (2004) gain by Republicans of six seats in Congress from Texas,[7] but will

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[6] Id.

[7] The plan resulted in a loss of six Democratic seats in Congress. Four Democratic incumbents were defeated for reelection in the 2004

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control the outcome in Texas congressional elections for the foreseeable future notwithstanding expected population shifts that otherwise should favor Democrats.

Voluntary redistricting may use unreliable federal decennial census data to disguise redistricting plans drawn to unfairly discriminate in a real sense against certain categories of voters. By using more current political and demographic data, such as voting trends (in voter registration, voter turnout, and partisan tendency), to determine district boundaries, a temporary legislative majority may pack opposing voters in as few districts as possible or counter an anticipated future growth in opposing voters in an election district by removing the voters from the endangered district. This discrimination may be disguised by the use of old, currently inaccurate census data to justify the new district configurations.

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general election (Congressmen Max Sandlin, Nick Lampson, Martin Frost and Charles Stenholm). One Democratic congressman (Jim Turner) declined to seek reelection in his redrawn district that contained only 4% of the residents of his previous district. One Democratic congressman (Ralph Hall) switched parties after the redistricting and won reelection in 2004 in his redrawn district as a Republican. Democratic Congressman Chris Bell was drawn out of his district and placed in a heavily Republican district. He sought reelection in a nearby congressional district, but lost in the Democratic Primary to African-American candidate Al Green. Only three of the ten Anglo Democratic incumbents won reelection as Democrats in 2004. Two of these won reelection only by running in nearby districts that are overwhelmingly Hispanic. The overall result of the redistricting was the defeat, retirement or switch of seven of the ten targeted Anglo incumbent congressmen, the gain by Republicans of six seats in Congress, and the marginalization of the Democratic Party in Texas by the packing of Democratic voters into ten districts, each with a minority population (according to the 2000 census) of over 70%. Only one Democrat, Congressman Chet Edwards, won election in a district with less than a 71% minority population.

The Texas redistricting offers several examples of this discrimination. As shown by the Ellis memos to Congressman DeLay, there was a concern among members of the Republican congressional delegation that Republican Congressman Bonilla could be beaten by a Democratic Hispanic because of the increase of Hispanic population and registration in the congressional district. The solution was to redraw District 23 to replace approximately 90,000 (according to the 2000 census) mostly Hispanic residents in Webb County with an equivalent number of Anglos (overwhelmingly Republican) from counties in central Texas. In reality, of course, this use of inaccurate census data disguised the truth about what was happening. In the 1990s, the number of Hispanics in Texas grew by 2,329,761 persons. The Hispanic rate of growth was 53.68% compared to a growth rate for Anglos of only 7.61%.[8] Texas

[8] The population figures in this paragraph are from the federal census and may be found in the record of this case in the reports of the Texas State Data Center contained generally in LULAC Exhibits 1-4 on remand. LULAC Exhibit 4 on remand is entitled "Population Change in Texas: Implications for Human and Socioeconomic Resources in the 21st Century." The pages of the exhibit are not numbered, but the data regarding changes in Texas by race and ethnicity can be found in the chart on the 24th page of the exhibit, entitled "Numerical Change in Population by Race/Ethnicity in Texas for 1980/1990 and 1990/2000" and the chart on the 25th page entitled "Percent Change in Population by Race/Ethnicity for 1980/1990 and 1990/2000 in Texas." Estimated changes in population between 2000-2003 are shown in the charts on the 5th page of the exhibit ("Total Population and Components of Population Change in Texas, 2000-2003"), the 7th page of the exhibit ("Ten Fastest Growing States in Numerical Terms in the United States, 2000-2003") and the 9th page ("Ten Fastest Growing States in Percentage Terms in the United States, 2000-2003"). The effect of population shifts among counties in Texas between 2000 and 2003 is shown on the 14th page of the exhibit ("Population Changes in Texas Counties, 2000-2003"). The reports also are available on the web site of the Texas State Data Center www.txdc.edu.

Republican officials, lawmakers and congressmen were aware of this growth when they voluntarily redistricted in 2003. They also knew that this explosive rate of growth in Hispanic residents was continuing (even perhaps accelerating) after 2000. According to official estimates from the federal census and the Texas Data Center, Webb County, with a population that is 90% Hispanic, was one of the state's fastest growing counties between 2000-2003. Detaching half of Webb County from District 23 and replacing it with an equivalent number (according to the 2000 census) of largely Anglo residents from slower-growing counties to the north to protect an endangered Republican incumbent was knowing ethnic and political discrimination disguised by the use of outdated, inaccurate 2000 census data.

At the trial below, Professor Richard Murray of the University of Houston testified that areas added by the redistricting plan to District 29 in Harris County that were shown as predominately black according to the 2000 census were actually increasingly Anglo by 2003. On the other hand, in Dallas County, the final redistricting plan packed the county's minority population into District 18. The minority population of the district was increased to an excessively high 76.1% (according to 2000 census data) by the addition of minority persons taken from the dismantled District 24. However, the 2000 numbers tell only half of the story. In reality, the percentage of minority persons in District 18 is almost certainly higher than 76.1% given the explosive growth of Hispanics in Dallas and Tarrant Counties between 2000-2003. By spreading both African-American and Hispanics among other safely Republican districts in Dallas and surrounding counties, the final

redistricting plan destroyed the possibility that the continuing explosive growth of Hispanic residents in District 24 over the remainder of this decade might make the district an Hispanic opportunity district.

A sometimes unseen threat of voluntary redistricting is its use to discriminate intra-party. In general elections most rural Texans vote heavily Republican in statewide races. However, many of these rural voters sometimes support Democratic candidates in local races or even vote in the Democratic primary. After all, it was these rural voters that had reelected many of the Democratic congressional incumbents in 2002 even while overwhelmingly supporting all of the Republican statewide candidates. The final redistricting plan dilutes the effect of these rural moderate Republican or independent voters by slicing up the state's rural areas (especially in East Texas) and stretching the redrawn districts to include the activist Republican strongholds in the suburbs around the major cities. The redrawn districts[9] permit the staunchly Republican voters in the suburbs to control the Republican primary to the detriment of the more moderate and independent rural voters and thereby to also control the outcome in the general election when a majority of these rural voters again vote for the Republican nominee. Former state senator and acting lieutenant governor (Republican) Bill Ratliff testified at trial that the final redistricting plan discriminated against voters in these rural areas.

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[9] *See* specifically Districts 2, 4, 5, 6, and 8.

The potential adverse impact of voluntary mid-decade redistricting is not limited to the redistricting of congressional districts, or even to the redrawing of state legislative districts. Every city, county, school district or other local government that elects its governing body from election districts would similarly be able to voluntarily redistrict mid-decade to maintain or enhance the political power of a political party or interest group. At the local level, the temporary majority may represent some interest group other than a partisan party. Yet, the threat to representative government is the same. For example, given the intensity of the recent controversy over teaching intelligent design in public schools, it is not difficult to imagine a temporary majority on this issue on a school board taking a lesson from the Republican majority in Texas and deciding to voluntarily redistrict in an effort to keep its majority on the governing board.

In sum, voluntary mid-decade redistricting using sophisticated political data bases along with old, inaccurate census data permits a temporary majority to engineer a redistricting plan that will maximize the group's voting strength for the foreseeable future to the detriment of representative government. The final Texas congressional redistricting plan is an excellent example. According to the federal bureau of census and the state data center, by 2004 Anglos were a minority of the state's population. Moreover, these sources predict that the percentage of Anglos in Texas will continue to decline. Some Texas State Data Center projections show that the percentage of Anglos in the state population may drop to 45.6% by 2010.[10] However, the 2003

[10] LULAC Exhibit 4 on remand in the chart entitled "Population in Texas by Race/Ethnicity in 2000 and Projections of the Population in

(Continued on following page)

redistricting plan is carefully designed to allow a subset of the Anglo demographic group (i.e., activists in the Republican Party) to control the outcome in at least 21 of the state's 32 congressional districts[11] for this decade and possibly the foreseeable future notwithstanding this explosive growth of the state's Hispanic residents.

If the legislative body does not make a good faith effort to provide election districts that afford equal representation to equal numbers of people, it will deliberately reduce the voting power of many of its citizens. Such a reduction is an affront to and is inconsistent with the basic concept of democratic voting. Partisan or interest group game playing by a legislature should not be allowed to threaten the fundamental rights of citizens or representative government.

Texas by Race/Ethnicity from 2010 to 2040." The chart is on the 35th page of the exhibit and shows projections based on different assumptions. The calculation in the text is the projection based on an assumption that migration continues at a rate equivalent to the estimated rate for 2000-2002 and appears in the chart on the 37th page ("Percent of Population in Texas by Race/Ethnicity in 2000 and Projections of the Percent of the Population in Texas by Race/Ethnicity from 2010 to 2040").

[11] The ratio is more likely to be 22-10. One Anglo Democratic incumbent, Chet Edwards, won reelection in 2004 in a district (District 17) that voted overwhelmingly Republican in other races. The district is not likely to continue to elect a Democrat especially once Edwards leaves office.

II. The Constitution of the United States Prohibits Redistricting With Inaccurate Population Data to Replace a Lawful Existing Districting Plan Except in Furtherance of a Compelling State Interest and as Narrowly Tailored to Meet That Interest.

The Constitution of the United States, through Article I, Section 2 and the Fourteenth Amendment, requires that a state or local legislative body "make a good faith effort" to draw all election districts "as nearly equal in population as is practicable."[12] In *Westberry v. Sanders*,[13] this Court explained that Article I, Section 2 of the United States Constitution requires "equal representation for equal numbers of people [as] the fundamental goal for the House of Representatives" because this establishes a "high standard of justice and common sense."[14]

Article I, Section 2 governs congressional districts and "permits only the limited population variances that are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[15] "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how

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[12] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Karcher v. Daggett*, 462 U.S. 725, 730 (1982).

[13] 376 U.S. 1 (1964).

[14] Id. at 18.

[15] *Karcher*, 462 U.S. at 730, quoting from *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

small."[16] Once a constitutional plan is in place it remains valid for the remainder of the decade.

The population enumeration from the recent federal decennial census is used for measuring the equality of existing districts and for designing new election districts. From the moment of the taking of the actual census onward, however, populations throughout state and local jurisdictions are constantly changing, often at different rates, up or down. Ordinarily, any resulting inaccuracy in census data does not affect the constitutional merits of districting plans using such data because: (1) the new districting plan is replacing an existing unconstitutional districting scheme that cannot be used for future elections and (2) most districting plans are enacted within the narrow window between when the census data first becomes available (e.g., early 2001) and when the new districts must be in place for the upcoming party primary and general congressional and state legislative elections (e.g., 2002). Census data, even though flawed, are the best and perhaps the only lawful tools in such circumstances for drawing districting plans to replace unlawful districts.[17] After all, there is effectively no alternative. The data from the last census comprise the most comprehensive, precise and objectively attainable enumeration data available.

Mid-decade replacement of a valid existing districting plan with a new plan based on now older and even less reliable census data poses a new problem. As time passes

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[16] *Kirkpatrick*, 394 U.S. at 531.

[17] *See Karcher*, 462 U.S. at 736 ("[T]he census data provides the only reliable – albeit less than perfect – indication of the districts' 'real' relative population levels.").

after a census is taken, the census enumeration provides an increasingly unreliable means for determining the relative equality of districts (especially in a fast-growing state like Texas). Although impossible to specifically quantify, this increasing inaccuracy and unreliability in population data is evident to members of state and local legislative bodies, to all participants in any redistricting process, and to state and federal courts. Therefore, a state or local legislative body that redistricts using such data is doing so without a true guide as to the real impact of the enactment on the equality of the district populations. At its most benign, the legislative body is guessing as to whether the new districts will be more or less equal in population than the valid existing districts. It is possible that a new voluntary redistricting plan based on old census data will not result in a districting plan in which the districts are more malapportioned than the existing one. Through some coincidence, the real population deviations among the new districts (drawn using census data that is now older and less reliable than before) could be less than the real population deviations of the existing ones. Conversely, it is also possible that the new plan may be grossly more malapportioned than the existing one. Inaccurate census data provide no reliable answer. It is the legislative body that bears the constitutional responsibility for making a good faith effort to provide election districts of equal population and that has the burden for justifying its voluntary redistricting. Under such circumstances the districts in the new enactment can not be presumed to be the result of a good faith effort to fulfill the fundamental constitutional duty of providing equal representation for equal numbers of people. Implicit in the concept of "good faith" is the use of currently reliable population data.

There are, of course, occasions when a legislative body may find it necessary to adopt a redistricting plan "mid-decade" to replace an existing plan. The critical legal issue, however, is not whether a particular redistricting enactment is considered "mid-decade," but whether the enactment is replacing a valid existing plan. Court decisions following *Reynolds v. Sims* show how it may be necessary to use even out-dated and unreliable census data mid-decade to design a new districting plan to replace an unconstitutional one.[18] If a districting plan has been struck down mid-decade, that required a legislative body or court to redraw the affected districts based on old census data.[19] Replacing an unlawful districting scheme is a compelling state interest. In such circumstances, the mid-decade use by the legislative body or court of old, unreliable census data is a result of necessity, and not, as urged by Appellees, an unrestricted license to use such data to voluntarily redraw lawful districts for any reason whatsoever.

In view of the potential impact of such increased malapportionment on the fundamental rights of a state's citizens, any voluntary redistricting must be subject to strict scrutiny. This strict scrutiny must extend both to the enactment's effect on real population equality and to the legitimacy and importance of the interests offered to justify the changes in district boundaries.

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[18] *See, e.g., Kirkpatrick* (considering a 1967 legislative enactment drawing congressional districts on the basis of 1960 census data to replace an existing unconstitutional districting plan).

[19] *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996) (upholding a finding that certain of Texas's 1991 congressional districts were racial gerrymanders violative of the United States Constitution).

III. The District Court Below Erred by Upholding the 2003 Congressional Redistricting Plan.

While all of the members of the court below acknowledged that mid-decade redistricting is not good policy, they split over whether the argument raised by *Amicus* should be adopted. District Judge Ward indicated that he would adopt the one person, one-vote arguments presented by *Amicus* and Travis County. The other members of the court, Judges Higginbotham and Rosenthal, acknowledged that the *Amicus* argument was a narrower and seemingly more plausible contention than the claims of excessive partisanship, but declined to adopt it. The majority offered six reasons for why it was not persuaded to adopt the argument. None is persuasive.

First, the court (including Judge Ward) concluded that the *Amicus* argument for application of the requirement of equal representation for equal numbers of persons was not within the scope of this Court's remand. Whether correct or not, this rationale is not applicable to this Court.

Second, the majority of the court concluded that preventing reliance on the legal fiction of the continuing accuracy of the census data would effectively preclude legislatures from replacing a court-drawn plan with their own even though courts have recognized such a prerogative. Eliminating the legal fiction would make voluntary redistricting more difficult; it would not, however, make it impossible. Instead, whether tweaking its own districts or those drawn by a court, the legislative body's burden would be consistent with its overriding constitutional duty to act in good faith to provide equal representation for equal numbers of people. Legislative bodies should not be free to ignore the real effects of a voluntary decision to

redraw representative lines (even when replacing a court-ordered plan). A legislature's right to redraw election district lines is important, but it does not trump the constitutional obligation of population equality among election districts. All redistricting is not equal in magnitude. A legislative body's burden of justification for voluntarily redrawing election district lines depends as a legal and practical matter on the magnitude and nature of the specific proposed changes.

Another reason given by the majority for not adopting *Amicus'* argument was that the majority could not discern why districts drawn in 2001 on the basis of 2000 census data are more equipopulous if measured against current census numbers than those in districts in a plan adopted in 2003 on the basis of the same 2000 census data. This observation misunderstands the *Amicus* argument. *Amicus* agreed in its trial brief that newly enacted districts could actually improve population equality among districts even though based on old, inaccurate census data. But the opposite also is possible – i.e., that the newly enacted districts could significantly worsen the malapportionment. The problem is that no one knows the effect of a new plan drawn on the basis of old census data. The available census enumeration is inaccurate and provides no answers. At best the legislative body is essentially guessing at the effects and playing dice with the voting rights of its citizens. At worst it may be acting for constitutionally impermissible reasons. Before undertaking to voluntarily replace an existing valid districting plan, a legislative body has a duty to determine by clear and convincing evidence that the new plan does not worsen the existing population inequality or that the new plan is justified by a compelling state interest. The legislative

body must be prepared to make such a showing in court if the new plan is challenged. Otherwise, the valid existing plan should remain in effect.

The majority of the court below questioned whether striking down the 2003 redistricting plan and thus reinstating the 2001 districting plan would make sense. After all, both are based on 2000 census numbers and neither would produce equipopulous districts for elections held in 2006. Taken in isolation, such a result may seem strange. However, the outcome in this case is of much greater importance than merely the determination of the districts to be used in the 2006 elections in Texas. If this Court upholds the 2003 plan, it will invite other state and local legislative bodies to engage in similar unnecessary mid-decade redistricting using old census data. A determination that the redistricting is void because violative of the Constitution will make clear that a legislative body is not free to redistrict at will using inaccurate population data. By reducing the incentives to redistrict, the effect may still some of the corrosive cynicism that politicians continuously rig the system for themselves; at least it will not exacerbate that cynicism.

A fourth reason given by the majority was that adoption of the *Amicus'* argument might lead to challenges to existing redistricting plans during a decade based on the inequality existing in those districts because of population shifts. The majority provides no explanation or support for this position. The *Amicus'* argument applies only to voluntary redistricting plans enacted to replace an existing valid plan. The rule poses no risk to valid existing plans that enjoy the necessary legal fiction that districts that are valid when created remain so until the next census. Chief Justice Warren established long ago that limitations on

the frequency of redistricting efforts are justified by the need for stability and continuity in the legislative system.[20] The rule urged by *Amicus* is a measure for stability, not an incentive for litigation.

Although it did not specifically give the fact that the 2001 redistricting plan was a court drawn plan as a reason for rejecting *Amicus'* argument, some wording in the majority opinion suggests that this was a concern. It should not be. The federal court ended up drawing the congressional plan in 2001 because Republican strategy at the time saw a court plan as preferable to one enacted with the agreement of the Democratic-controlled Texas House of Representatives. Moreover, some Republicans could see ahead that, if Republicans could secure control of the state house through redistricting in 2001, they would have a clear path to enacting an aggressive partisan congressional redistricting plan in 2003. Congressman DeLay and his aide Jim Ellis have openly acknowledged that a purpose behind the efforts of DeLay's now controversial organization, Texans for a Republican Majority, aimed at electing a Republican majority to the Texas House in 2002, was to make a new partisan congressional redistricting plan possible in 2003. Moreover, the plan adopted by the court in 2001 was, as required by the rules of this Court, a plan drawn with the full participation of the State of Texas and designed to embody and maintain identifiable, legitimate state interests and policies. Appellees have never identified any significant state interest that was not embodied in the court plan, or that justified, much less required, redrawing the court plan statewide.

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[20] *See Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

Amicus recognizes that a state legislature could have justification for redoing a portion of a court plan to further a compelling state interest, but the partisan objectives in this case are not such a circumstance.[21] Using the federal courts as part of a long-term partisan strategy should not be rewarded.

Finally, the majority declined to accept *Amicus'* argument because it considered the argument too novel. There are times when a reader senses that Judges Higginbotham and Rosenthal came very close to adopting the *Amicus'* argument.[22] Nevertheless, ultimately they could not bring themselves to do so. None of the reasons given by the majority for rejecting *Amicus'* argument are founded in the jurisprudence of this Court nor are they sufficient reason not to apply the principle of equal representation for equal numbers of persons in a common sense manner that will protect individual citizen rights and representative government in this country.

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[21] Appellees have never shown a single instance in which the Texas Legislature (or the legislature of any other state for that matter) has significantly redrawn a court plan. *Amicus* in its response brief at trial showed how the Texas Legislature over 40 years had almost always either left court-drawn plans in place or enacted legislation embodying the court plan and maintaining the status quo.

[22] At the January 21, 2005 hearing, Judge Higginbotham indicated his concern over whether a lower court should "push forward its common-law power." He suggested, "The Supreme Court can take and do what it wants with it, I suppose . . . my reluctance has to do with . . . what should an inferior court do with this argument at this juncture." Transcript at 121-122 (January 21, 2005).

IV. Application of the Equal Population Requirement Provides a Common Sense, Easily Administered Means of Preventing the Harms Identified by the Appellants in this Case.

In *Vieth v. Jubelirer*,[23] several members of this Court expressed frustration with the Court's difficulty in finding a reliable and useable standard for measuring the unconstitutional dilution of the voting strength of a political group. Application in this case of the requirement that a legislative body must make a good faith effort to create districts of equal representation for equal numbers of people meets many of the concerns of the members of this Court.

First, the requirement of equal representation for equal numbers of persons is both justiciable and already a fundamental part of existing law. The "uniqueness" in this case is the extraordinary act of the Texas Legislature in replacing an existing lawful districting plan for partisan reasons, not the necessary adoption or application of any new principle of law. No partisan component of a legislative body should be entitled to enhance its partisan strength at the expense of possibly creating greater inequality among congressional or state legislative districts.

Second, the right to election districts as equal in population as practicable is an individual and personal right of each citizen. No partisan group necessarily benefits or suffers from the application or enforcement of this right. Therefore, the application of this principle in this and similar circumstances does not entail the recognition

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[23] 541 U.S. 267 (2004).

of any new right for any particular group, or the measurement of the effect of any districting plan on the voting strength of any specific political group.

Third, the event triggering the application of the principle in this case is readily apparent. If an existing districting plan is valid, any legislative replacement is subject to strict scrutiny.

Fourth, standards from previous applications of the equal population principle can readily be applied. For example, the standard establishing the prima facie unconstitutionality of certain redistricting plans because of a plan's deviation from absolute equality is firmly established. Such prima facie unconstitutionality merely shifts the burden to the state or local legislative body to justify the deviation. The same shift occurs in this circumstance. A new voluntary enactment is prima facie unconstitutional if based on inaccurate population data. The state or local legislative body can demonstrate that the new enactment is constitutional by showing by clear and convincing evidence that the changes in the new redistricting plan do not worsen the difference in real population equality among the districts, or that the risk of any increased inequality is justified by a compelling state interest and that the changes are narrowly tailored to meet that interest.

Fifth, federal courts are accustomed to considering the efficacy of a new redistricting plan against the benchmark of an existing plan. For example, the use of existing districting plans as benchmarks for determining the acceptability of new enactments regularly occurs under Section 5 of the Voting Rights Act of 1965. Similar to a Section 5 proceeding, one inquiry concerning a new voluntary

redistricting plan is whether it can be shown to be ameliorative (i.e., in regard to population equality) as compared to the existing plan. The burden rests with the legislative body that enacted the new plan. Given the fundamental nature of the individual right at stake, the legislative body's burden must be met by clear and convincing evidence to meet strict scrutiny.

Sixth, this Court has already resolved that redistricting for partisan advantage is not a compelling state interest. Partisanship may be an inevitable part of any redistricting, but it is not a state interest that justifies any variance from constitutional requirements. A state has a legitimate interest in drawing congressional districts "in a way that minimizes the number of contests between present incumbents."[24] The state interest being furthered by reducing incumbent contests[25] is the advantage to the state of preserving the seniority ranking in Congress of the members of its congressional delegation. This identifiable and legitimate "state" interest is distinct from the personal or partisan interests that may be at stake in the drawing of legislative districts designed to protect or to defeat certain incumbents or to provide an advantage to a particular political party.[26] Moreover, it is doubtful that

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[24] *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *see White v. Weiser*, 412 U.S. 783, 791 (1973).

[25] In Texas in 2003, the congressional redistricting plan was designed to defeat incumbent Democrats. Six Democrats (with approximately 84 years of combined seniority in Congress) were defeated or forced from office by the redistricting. In some circumstances, the incumbent Democrats were purposefully paired with incumbent Republican congressmen in districts drawn to elect the Republican.

[26] *See Larios v. Cox*, 300 F.Supp.2d 1320, 1348 (N.D. Ga.), *aff'd*, *Cox v. Larios*, 124 S.Ct. 2806 (2004).

even the state interest in avoiding contests among incumbents could ever justify any deviation from absolute population equality.

Seventh, recognizing the invalidity of using old census data voluntarily to replace existing lawful districting plans does not affect the sufficiency of using such data for the design of redistricting plans intended to remedy unconstitutional or illegal plans. The need to use the census enumeration (as the best available data) in such circumstances is firmly established, is a compelling state interest, and is unaffected by the strict scrutiny required in this case, or similar circumstances.

Finally, application of the principle of equal representation for equal numbers of people to voluntary mid-decade redistricting is not equivalent to an outright ban on voluntary mid-decade redistricting, even for partisan reasons. It merely places the burden of justification where it belongs under the Constitution – i.e., on the legislative body. As a practical and legal matter, the amount of justification necessary in a particular circumstance will vary. For example, a minor redrawing of the boundary between two districts to resolve a local issue is unlikely to either incite opposition or to require great justification. Nevertheless, in view of its constitutional duty to act in good faith to provide districts of equal population, it would be prudent even in this circumstance for the legislative body to look closely at the effects of what it is doing. On the other extreme is a statewide redistricting affecting millions of persons, such as the 2003 redistricting in Texas. It is difficult to imagine that such a massive redrawing of election district lines statewide could be justified. Certainly it is not justified by the partisan reasons given by the Appellees in this case.

The principle of equal representation for equal numbers of people is not equivalent to the constitutional right of a political group to challenge the purposeful dilution of its voting strength; nor is it intended to substitute for such a right. Similarly, the principle is not equivalent to a new definition of unconstitutional or unlawful discrimination against racial or ethnic minorities. However, application of this principle to voluntary redistricting will dissuade legislative bodies from undertaking unjustified mid-decade redistricting and therefore will limit the opportunities available for using inaccurate census data to adversely affect the fundamental rights of individual voters, to disguise discrimination against minority groups, or to redistrict for solely partisan or special interest reasons.

CONCLUSION

For the foregoing reasons, *Amicus* urges this Court to reverse the decision of the United States District Court for the Eastern District of Texas.

Respectfully submitted,

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